Office Supreme Court, U.S.
FILED
NOV 1 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

NO. 600

ARCHIE A. WHITE,
Respondent,

vs.

WARD LANE as Warden of the Indiana State Prison,
Petitioner.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWIN K. STEERS,
Attorney General of Indiana
WILLIAM D. RUCKELSHAUS,
Chief Counsel
Attorneys for Petitioner
219 State House
Indianapolis, Indiana
ME 3-5512

C. E. Pauley & Co., Inc., Indianapolis

INDEX

	Page
The Opinions Below	1
Jurisdiction	2
The Statute Conferring this Court's Jurisdiction over this Petition	3
The Questions Presented	3
The Federal and State Constitutional Provisions and Statutes Involved	3
Concise Statement of the Case	9
Reasons for Granting the Writ of Certiorari	14
Appendix	19

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

NO. _____

ARCHIE A. WHITE,

Respondent,

vs.

WARD LANE as Warden of the Indiana State Prison,

Petitioner.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Archie A. White* v. *Ward Lane*, (7th. Cir. July 17, 1963), — F.2d —, No. 14004. It is reprinted in full as an appendix to this petition.

The overruling of the Petition for Rehearing and the dissenting opinion thereto are reported as *Archie A. White*

v. *Ward Lane* (7th Cir. August 20, 1963), — F.2d —, No. 14004. The Court's ruling and the dissenting opinion are reprinted in full as an appendix to this petition.

The ruling of the United States District Court for the Northern District of Indiana is unreported and is printed in full as an appendix to this petition.

The ruling of the Indiana Supreme Court on Respondent's attempted appeal from the denial of his Coram Nobis petition is reported as *White* v. *State* (1959), 239 Ind. 710, 159 N.E. (2d) 388. This per curiam opinion is reprinted in full as an appendix to this petition.

The ruling of the Indiana Supreme Court on Respondent's Petition for Rehearing on his appeal from the denial of his Coram Nobis petition is reported as *White* v. *State* (1959), 240 Ind. 697, 162 N.E. (2d) 677. This per curiam opinion is reprinted in full as an appendix to this petition.

Respondent's first Petition for Certiorari filed in the United States Supreme Court is reported as *White* v. *Indiana* (1960), 362 U.S. 981. This petition was denied without opinion.

Respondent's second Petition for Certiorari filed in the Supreme Court of the United States is reported as *White* v. *Indiana* (1962), 368 U.S. 970. This petition was denied without opinion.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1963.

The Petition for Rehearing was overruled on August 20, 1963.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This Court's jurisdiction over this petition for Certiorari is conferred by Title 28, Section 2101, of the United States Judicial Code, which authorizes this Court to grant certiorari to review judgments of United States Courts of Appeal on petitions filed within ninety (90) days from the date of entry of such judgment.

THE QUESTIONS PRESENTED

The questions are:

1. Can a Federal Circuit Court in a habeas corpus proceeding ignore procedural rules of a State for the prosecution of a direct appeal in the State Court when there is no showing that those State procedural rules denied any substantive right to the petitioner; and, further, grant a remedy of direct appeal in the State court when the petitioner did not request it?

2. Does Respondent have the additional State remedy of a Belated Appeal or right to file a petition to file a Belated Motion for New Trial in Indiana?

3. Can a Federal Circuit Court accept, as true, the fact allegations in a Habeas Corpus petition when the District Court dismissed the petition in the District Court without further pleading, or a hearing on the grounds that the State remedies had not been exhausted?

THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional and statutory provisions involved in this appeal are as follows:

1. Section of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana Public Defender Act reads in relevant part as follows:

2. Indiana Acts 1945, Ch. 38, Sec. 1, as found in Burns' Indiana Statutes, Section 13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

3. Indiana Acts 1945, Ch. 38, Sec. 2, as found in Burns', Section 13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

4. Indiana Acts 1945, Ch. 38, Sec. 5, as found in Burns', Section 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

The Indiana Belated Appeal Statute is:

Indiana Acts 1947, Ch. 189, Sec. 5, as found in Burns', Section 9-3305:

"The Supreme Court of Indiana may, for good cause shown, under such rules as it may adopt or under such orders as it may make in a particular case, permit appeals from a judgment of conviction after the original time for taking an appeal has elapsed."

Rule 2-40 of the Indiana Supreme Court adopted September 11, 1963, reads as follows:

"Hereafter, no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case of which the cause therefor is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.

"Trial counsel representing a defendant or the defendant pro se shall, in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time prescribed by the rules of this court. If no timely motion for a new trial is filed by a defend-

ant's trial counsel or by the defendant pro se, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiescence in, and an acceptance of, the judgment of the trial court by the defendant.

"Time limitations with reference to motions for a new trial shall be applicable hereto. Provided, however, if the moving party first obtains knowledge of an alleged ground after the time within which a motion for a new trial may be filed, such party may file a petition requesting permission to file a belated motion for a new trial, which motion shall be attached to said petition. Not more than one belated motion for a new trial in the same case may be entertained or considered by a court unless the subject matter of the action had not come or could not come by the exercise of diligence to the knowledge of the petitioner at the time of the filing of such belated motion for a new trial. The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial.

"The Attorney General of the State of Indiana and the Prosecuting Attorney of the judicial district where in such petition is filed shall be given notice of the filing of the petition and thirty (30) days' time within which to answer same. A copy of the petition shall be served with the notice.

"In the event a belated motion for new trial is filed in forma pauperis, it shall be the duty of the Public Defender of the State of Indiana to represent the peti

tioner in said proceedings, if he, after diligent inquiry, finds merit thereto, subject, however, to the provisions of Rule 2-40A infra.

"Affidavits may be filed with and in support of or in opposition to petitions for belated motions for new trials and motions for new trials and shall be considered as evidence without introduction thereof. The court may hear additional evidence at its discretion. The petition and affidavits filed in support thereof or in opposition thereto shall be a part of the record without a bill of exceptions. The parties thereto shall not be entitled to a change of venue from the county or change of judge.

"This rule shall be applicable only to criminal proceedings."

Rule 2-40A of the Indiana Supreme Court, adopted September 11, 1963, reads as follows:

"Rulings on petitions to file belated appeals, rulings on petitions to file belated motions for a new trial and rulings on belated motions for new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for a writ of certiorari in the Supreme Court of this state.

"A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the Attorney General at the time of filing. To this petition the Attorney General shall file a response under oath admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, together with brief in support thereof. If there is a conflict as to the statement of the record below, this court may direct the

clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this court.

"If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evidence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

"It shall be the duty of the Public Defender of the State of Indiana to represent indigent persons who are inmates of penal institutions of the State of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petitions for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after diligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the Public Defender to represent any petitioner in such cases (as provided in Rule 2-40B, supra), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the Public Defender has failed or refused to represent them, a citation shall be issued to the Public Defender by this court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the court shall determine whether or not an order shall issue requiring the Public Defender to represent the petitioner.

"In the event the proceedings are in forma pauperis, no costs shall be taxed against petition for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

"The petition and brief for writ of certiorari shall be filed with sixty (60) days after the ruling complained of, and the response thereto within thirty (30) days

after the filing of the petition for the writ. The petitioner may file a reply brief within ten (10) days after the filing of the response. No other briefs or pleadings shall be filed. Six (6) copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

"The court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

"Provided further, that where the petitioner for the writ does not meet with the rules of this court, the same may be denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

"This rule shall be applicable only to criminal proceedings.

"These rules, because of an emergency, shall become effective immediately.

"Dated this 11th day of September 1963."

CONCISE STATEMENT OF THE CASE

A

NATURE OF THE CASE AND ITS DISPOSITION IN THE DISTRICT AND APPELLATE COURTS

This action commenced as a Petition for Writ of Habeas Corpus brought on March 2, 1962, by Respondent, to contest the legality of his detention in the Indiana State Prison by Warden, Ward Lane. (All references to the record will be to Respondent's Appendix as filed in the court below; nine [9] copies of which have been filed with this petition. Appendix, page 1 as A-p. 1.) Without any plead

ings having been filed by the State, or hearing being held, the District Court denied Respondent's Petition for Writ of Habeas Corpus on that grounds that he had not exhausted his State remedies, "namely a belated appeal, Burns' Indiana Statutes (1956 Repl.), Sec. 9-3305." (A-p. 16.)

The District Court then denied Respondent's request for a Certificate of Probable Cause on the following grounds:

"IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

"ARCHIE A. WHITE
PETITIONER
VS.
WARD LANE, WARDEN
INDIANA STATE PRISON
RESPONDENT
CIVIL NO. 3010

"ORDER

"Petitioner has filed a request for a Certificate of Probable Cause so that he can appeal from this Court's Order of June 15, 1962, denying his Petition for Writ of Habeas Corpus. 28 U.S.C.A. § 2253.

"Petitioner alleges that his case is similar to the facts in this Court's decision in *Brown* vs. *Lane*, 196 F. Supp. 484 (D.C.N.D. Ind. 1961). However, it must be remembered that Mr. Brown had exhausted all his available remedies in the State Court of Indiana before he came into this Court. This petitioner has not exhausted his remedies, nor does he indicate to this Court any grounds upon which relief could be granted.

"For the reasons set out in this Court's Order of June 15, 1962, it is clear that there is no probable cause existing for the appeal that petitioner seeks to perfect.

"IT IS THEREFORE THE ORDER OF THIS COURT THAT petitioner's request for a Writ of Probable Cause be, and the same is, hereby, denied.

"/s/ Robert A. Grant
JUDGE

"ENTER: Sep. 28, 1962."

On November 23, 1962, the United States Court of Appeals for the Seventh Circuit granted Respondent herein leave to proceed in forma pauperis and appeal the denial of his Writ of Habeas Corpus. The Court also appointed counsel for Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Respondent's Petition for Writ of Habeas Corpus reveals the following fact situation. Respondent was convicted of incest on January 28, 1957, in the Harrison County, Indiana Circuit Court. (A-p. 4.) The trial was had before a jury and Appellant was represented by counsel. (A-p. 11.) Respondent's petition alleges—although this fact was never litigated in the District Court—that when his attorney asked him if he wanted to appeal his case, Respondent answered in the affirmative and his attorney said he would appeal it for him. (A-p. 11.) No direct appeal was ever prosecuted from Respondent's original conviction.

Sometime after his conviction, but before he took any further action, Respondent sought the assistance of the Public Defender. The Public Defender, through his Deputy, Thomas A. Hoadley, declined to assist Respondent, presumably in a belated appeal as his time for taking a regular

appeal had expired, saying there "* * * are neither procedural or evidentiary errors in your record of trial upon which to base an appeal." (A-p. 13.) This statement was contained in a letter sent to Appellant on July 16, 1957. (A-p. 13.) The Public Defender told Respondent to file a belated motion for new trial and belated appeal. (A-p 13.) Respondent did neither.

On or about January 31, 1958, Respondent filed a Writ of Error Coram Nobis in the Harrison County Circuit Court. (A-p. 4.) The Public Defender was apparently not asked to assist him in the preparation or filing of the Writ. After several pleadings, Respondent's Petition for Writ of Error Coram Nobis was denied on or about December 8, 1958. (A-p. 6.) The contents of the Petition for Writ of Error Coram Nobis are not set out in the record, nor is it clear from the record what questions were raised by the Writ.

On or about December 23, 1958, Respondent filed a Petition for an Appeal as a Poor Person in the Harrison Circuit Court. (A-p. 6.) Respondent then filed in the Supreme Court of Indiana on or about April 8, 1959, a "Motion Nonesuit (Appeal) * * *." So Petitioner could appeal the Harrison Circuit Court decision in the Indiana Supreme Court." (A-p. 6.) Apparently, this was an attempt to appeal the denial of the Coram Nobis Writ, as the Petition to Appeal as a Poor Person was not acted upon. (A-p. 6.) The Supreme Court of Indiana, in a Per Curiam Opinion, denied Respondent's petition on June 29, 1959. The Court treated the petition as an attempted appeal from the Coram Nobis denial and denied it as not being timely filed under Indiana Supreme Court Rule 2-2.

White v. *State* (1959), 239 Ind. 710, 159 N.E. (2d) 388.

On or about September 4, 1959, Respondent filed in the Indiana Supreme Court a "Motion for Review on Motion Nonesuit (Appeal)." (A-p. 7.) The Indiana Supreme Court treated this pleading as a petition for rehearing and dismissed it for failure to timely file it pursuant to Indiana Supreme Court Rule 2-22.

White v. *State* (1959), 240 Ind. 697, 162 N.E. (2d) 677.

Respondent then filed a Petition for Writ of Certiorari in the United States Supreme Court on March 7, 1960. (A-p. 7.) This was denied by the Supreme Court on May 16, 1960.

White v. *Indiana* (1960), 362 U.S. 981.

On July 1, 1960, Respondent filed in the Harrison Circuit Court a Verified Petition for Appointment of Counsel. (A-p. 7.) It is not stated for what purpose Respondent wanted this counsel. From the denial of this request, Respondent appealed to the Supreme Court of Indiana and his appeal was apparently finally denied on June 19, 1960. (A-p. 7.) [Petitioner has been unable to locate this denial in the reports.]

Respondent again filed a Petition for Writ of Certiorari in the Supreme Court of the United States which was also denied.

White v. *Indiana* (1962), 368 U.S. 970.

On March 2, 1962, Respondent filed his Petition for Writ of Habeas Corpus in the District Court for the Northern District of Indiana. (A-p. 1.)

It should be noted that after the Public Defender refused to represent Respondent, all his pleadings were filed pro se.

The sole basis on which Respondent's Writ of Habeas Corpus was denied was that Respondent had not exhausted his State remedies. (A-p. 15.)

REASONS FOR ALLOWANCE OF THE WRIT

Rule 19 (b) of the Supreme Court of the United States indicates that one of the considerations which this Court weighs in deciding whether to grant a Writ of Certiorari, is where a Federal Appellate Court has decided an important state question in conflict with applicable State law. Secondly, Rule 19 (b) indicates that this Court will also weigh a situation where a Federal Appellate Court has "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." Petitioner respectfully submits that both these criteria apply in this case.

1. It would be difficult to overemphasize the importance of questions involving the rights of indigents in Indiana to appellate review after this Court's decision in *Lane* v. *Brown* (1963), 372 U.S. 477. The decision of the court below, while purportedly resting on *Lane* v. *Brown*, *supra*, in fact has little or nothing to do with that case. The decision below grants to Respondent a full appeal on the merits in the Supreme Court of Indiana from his conviction in the Harrison County Circuit Court.

Indiana law is clear on the time limits within which any convicted defendant must prosecute his appeal. A Motion for New Trial must be filed with the trial court within thirty (30) days from the time the verdict or decision is rendered.

> Indiana Acts 1880, Ch. 38, Sec. 422, as amended and as found in Burns' (1946 Repl.), Section 2-2403.

No such motion was ever filed.

Rule 2-2 of the Indiana Supreme Court states in part:

> "In all appeals and reviews the assignment of errors and transcript of the record must be filed in the office of the Clerk of Supreme Court within 90 days from the date of the judgment or the ruling on the motion for a new trial, * * * ".

No such transcript was ever filed. Further, Respondent in his Petition for Writ of Habeas Corpus did not ask for a full appellate review of his original conviction, but only a review of the denial of his Petition for Writ of Error Coram Nobis. (A-p. 9.)

Thus, the Court of Appeals below has seen fit to totally ignore applicable State law and grant Respondent a right which, under State law, he did not possess, and which he understandably did not assert in the Federal Courts. *Lane v. Brown, supra*, does not so hold. It is submitted that if Indiana appellate procedure is to have any validity at all in a Federal court, this decision must be overturned and this Court should grant this petition.

2. The court below did not even go into the question of whether Respondent had exhausted his State remedies. The exhaustion doctrine was the basis of the decision in the District Court. Because the District Court did not feel

that Respondent had exhausted his State remedies, the Court dismissed the petition without ever reaching the merits of the petition. It is Petitioner's position that the District Court was clearly right and that Respondent had the remedy of belated appeal available to him in Indiana.

> Indiana Acts 1947, Ch. 189, Sec. 5, as found in Burns' (1956 Repl.), Section 9-3305.

Respondent now has the additional remedy in the State provided in Indiana Supreme Court Rule 2-40. (Reprinted *supra.*)

3. The decision of the Circuit Court assumes that all of the allegations of Respondent in his Petition for Certiorari are true and that Indiana, by operation of its law, has denied Petitioner his right to appeal. None of the fact allegations were ever litigated in the District Court. The District Court did not reach these allegations as it decided that the State remedies had not been exhausted. If the Circuit Court below decided that the District Court was in error and the State remedies had been exhausted, then at least that Court should have remanded the case for a hearing on the fact allegations in Respondent's petition. The State of Indiana has never had an opportunity to meet these allegations. The Circuit Court's decision sets a very dangerous precedent. A state prisoner henceforth could file a Petition for Writ of Habeas Corpus in a Federal District Court, knowing his State remedies were not exhausted, and then appeal the inevitable denial of his petition with the Circuit Court above considering the merits of his petition when those merits had never been litigated below.

CONCLUSION

Petitioner strongly urges that this Court grant certiorari in this case. The effect of the decision of the Seventh Circuit is to overrule or at least overlook Indiana's procedural rules relating to appeals. A wealthy petitioner would never be able to have a direct appeal granted, after the time for filing a motion for new trial had run, on the bare unproven allegation that his attorney had not taken an appeal after promising to do so. This decision thus denies to non-indigents equal protection.

The decision of the Supreme Court in *Lane v. Brown, supra*, was an attempt by this Court to see that indigents were treated in the same manner as non-indigents for purposes of appeal. It held nothing more. In the present case, the Seventh Circuit has held that indigents are to be given preferred treatment on appeal. There is no basis in either law or logic for such a holding.

For these reasons, Petitioner request this honorable court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

EDWIN K. STEERS,
Attorney General of Indiana

WILLIAM D. RUCKELSHAUS,
Chief Counsel
Attorneys for Petitioner
219 State House
Indianapolis, Indiana
ME 3-5512